Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 80-2218

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF WILLIAM R. COLE FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is summary judgment improper where motive, intent, or subjective feelings must be determined either to establish the existence of a conspiracy to deprive one of constitutional rights or to establish a subjective good faith qualified immunity defense?

2. Does legislative immunity protect a state legislator from liability for actions taken outside the sphere of legitimate legislative activity, even though he may be engaging in legislatively related activity when he takes the action?

3. Does Paul v. Davis prohibit recovery of damages for defamation under 42 U.S.C § 1983 when the defamatory remarks constitute a continuing assault on a property interest?

4. May a plaintiff alleging a deprivation of constitutional rights be denied full access to federal courts simply because he has utilized available administrative remedies and partially regained lost rights?

5. Does the FIRST AMENDMENT guarantee the right to advocate a strong military defense and to work toward that end, and is punishment of the exercise of that right violative of the amendment's proscription?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes, defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee and Francis J. Cummings, defendant-appellee.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES TO PROCEEDINGS.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....vi

REFERENCE TO REPORT OF OPINIONS.....1

JURISDICTIONAL GROUNDS.....1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOVED IN THIS CASE.....2

STATEMENT OF THE CASE.....3

ARGUMENT:

1. Summary Judgment is improper where motive, intent, or subjective feelings must be determined either to establish the existence of a conspiracy to deprive one of constitutional rights or to establish a subjective good faith qualified immunity defense.....23

2. Legislative immunity does not protect a state legislator from liability for actions taken outside the sphere of legitimate

PAGES

legislative activity, even though he may be engaging in legislatively related activity when he takes the action.....32

3. Paul v. Davis does not prohibit recovery of damages for defamation under 42 U.S.C. § 1983 when the defamatory remarks constitute a continuing assault on a property interest.....38

4. A plaintiff alleging a deprivation of constitutional rights shuld not be denied full access to federal courts simply because he has utilized available administrative remedies and partially regained lost rights.....44

5. The FIRST AMENDMENT guarantees the right to advocate a strong military defense and to work toward that end, and punishment of the exercise of that right is violative of the amendment's proscription.....50

CONCLUSION.....57

CERTIFICATE OF SERVICE.....58

APPENDIX.....60

TABLE OF AUTHORITIES

CASES CITED — PAGES

Adickes v. S. H. Kress and Company, 398 U.S. 144, 26 L.Ed 2d 142, 90 S.Ct. 1598 (1970).....29

Bishop v. Wood, 426 U.S. 341, 48 L.Ed 684, 96 S.Ct. 2074 (1976).....45

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L.Ed 2d 619, 91 S.Ct. 1999 (1971).....48, 49

Brandenburg v. Ohio, 395 U.S. 444, 23 L.Ed 2d 430, 89 S.Ct. 1827 (1969).....50

Bush v. Lucas, 598 F.2d 958, reh. den., 605 F.2d 554 (5th Cir. 1979), vacated, 446 U.S. 914, 64 L.Ed 2d 268, 100 S.Ct. 1846 (1980).....46

Butz v. Economou, 438 U.S. 478, 57 L.Ed 2d 895, 98 S.Ct. 2894 (1978).....24, 26, 27 .....28, 49

Carlson v. Green, 446 U.S. 14, 64 L.Ed 2d 15, 100 S.Ct. 1468 (1980).....46

Cole v. Gray, 638 F.2d 804 (5th Cir. 1981).....1

Conrad v. Delta Air Lines, Inc.,
494 F.2d 914 (7th Cir.
1974).....25

Crowe v. Lucas,
595 F.2d 985 (5th Cir.
1979).....30

Davis v. Passman,
442 U.S. 228, 60 L.Ed 2d
846, 99 S.Ct. 2264 (1979).....46

Eastern Railroad Presidents
Conf. v. Noerr Motor Freight,
Inc.,
365 U.S. 127, 5 L.Ed 2d 464,
81 S.Ct. 523 (1961).....50

Garrison v. Louisiana,
379 U.S. 64, 13 L.Ed 2d
125, 85 S.Ct. 209 (1964).....50

Givhan v. Western Line Consoli-
dated School District,
439 U.S. 410, 58 L.Ed 2d
619, 99 S.Ct. 693 (1979).....55

Gomez v. Toledo,
___ U.S. ___, 64 L.Ed 2d
572, ___ S.Ct. ___ (1980).....47

Gravel v. United States,
408 U.S. 606, 33 L.Ed 2d
583, 92 S.Ct. 2614 (1972).....36

Halperin v. Kissinger,
606 F.2d 1191 (D.C. Cir.
1979), cert. granted, ___
U.S. ___, 64 L.Ed 2d 807,
___ S.Ct. ___ (1980).....24, 25, 26

Hutchinson v. Proxmire,
443 U.S. 111, 61 L.Ed 2d
411, 99 S.Ct. 2675 (1979).....34, 35

Imbler v. Pachtman,
424 U.S. 409, 47 L.Ed 2d
128, 96 S.Ct. 984 (1976).....26

Marrero v. City of Hialeah,
625 F.2d 499 (5th Cir.
1980).....40, 41

Moore v. Otero,
557 F.2d 435 (5th Cir.
1977).....40

Mt. Healthy City School Dist.
Bd. of Education v. Doyle,
429 U.S. 274, 50 L.Ed 2d
471, 97 S.Ct. 568 (1977).....55

N.A.A.C.P. v. Button,
371 U.S. 415, 9 L.Ed 2d
405, 83 S.Ct. 328 (1963).....45, 50

Owen v. City of Independence,
445 U.S. 622, 63 L.Ed 2d
673, 100 S.Ct. 1398 (1980).....40, 46

Patsy v. Florida International
University,
634 F.2d 900 (5th Cir.
1980).....45

Paul v. Davis,
424 U.S. 693, 47 L.Ed 2d
405, 96 S.Ct. 1155 (1976).....6, 38, 39
.....40, 41, 42

Poller v. Columbia Broad-
casting System, Inc.,
368 U.S. 464, 7 L.Ed 2d
458, 82 S.Ct. 486 (1962).....25

Procunier v. Navarette,
434 U.S. 555, 55 L.Ed 2d
24, 98 S.Ct. 855 (1978).....24

Scheuer v. Rhodes,
416 U.S. 232, 40 L.Ed 2d

90, 94 S.Ct. 1683 (1974).....24

Slavin v. Curry,
574 F.2d 1256 (5th Cir. 1978), modified in part on other grds., 583 F.2d 779 (5th Cir. 1978).....25

Smith v. Arkansas State Highway Employees,
441 U.S. 463, 60 L.Ed 2d 360, 99 S.Ct. 1826 (1979).....50

Sotto v. Wainwright,
601 F.2d 184 (5th Cir. 1979).....45

Tenney v. Brandhove,
341 U.S. 367, 95 L.Ed 1019, 71 S.Ct. 783 (1951).....32, 33, 35

Thompson v. Bass,
616 F.2d 1259 (5th Cir 1980), cert. den., Thompson v. Turner, ___ U.S. ___, 66 L.Ed 2d 245, ___ S.Ct. ___ (1980).....48

United States v. Gillock,
445 U.S. 360, 63 L.Ed 2d 454, 100 S.Ct. 1185 (1980).....35

Wood v. Strickland,
420 U.S. 308, 43 L.Ed 2d 214, 95 S.Ct. 992 (1975).....23

CONSTITUTIONAL PROVISIONS

United States Constitution,
First Amendment.....2, 4, 39, 42, 47
.....48, 50, 52, 54, 55

Fifth Amendment.....2, 46

Fourteenth Amendment.....2

STATUTES CITED

28 U.S.C. §1254(1).....1
28 U.S.C. §1983.....2, 3, 6
.....45, 47, 49
28 U.S.C. §1985.....2, 3

OTHER AUTHORITIES

Army Regulation 20-1, 25 October 1974, Chapter 4, ¶4-2.....2

Department of the Army Technical Bulletin, TB-IG4, Inspector General Guidance Material, August 1967:

§1, ¶14.....2, A67
§1, ¶15.....2, A68
§V, ¶41(b).....2, A69

RULES OF COURT

Rules of the Supreme Court of the United States:

Rule 17.1(c).....30, 31, 37
.....43, 49, 56

Rule 21.1(f).....2

Fed. R. Civ. P.....23

REFERENCE TO REPORT OF OPINIONS

The opinion of the United States District Court for the Middle District of Alabama was unreported.

The United States Court of Appeals for the Fifth Circuit affirmed in part, and reversed in part the decision of the district court and the opinion of the Fifth Circuit is reported at 638 F.2d 804 (5th Cir. 1981).

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 2, 1981. The petitioner timely filed a Petition for Rehearing and a Petition Containing Suggestion of En Banc Rehearing on March 16, 1981. Both the Petition for Rehearing and the Petition for Rehearing En Banc were denied on March 31, 1981.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

(Pursuant to Rule 21.1(f) of the Rules of the Supreme Court of the United States, the pertinent text of the constitutional provisions, statutes and regulations cited below is set forth in the Appendix hereto.)

UNITED STATES CONSTITUTION, FIRST AMENDMENT

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

42 U.S.C. §1983

42 U.S.C. §1985(3)

ARMY REGULATION 20-1, 25 OCTOBER 1974, CHAPTER 4, ¶4-2

DEPARTMENT OF THE ARMY TECHNICAL BULLETIN, TB-IG4, INSPECTOR GENERAL GUIDANCE MATERIAL, AUGUST 1967, §1, ¶¶14, 15; §V, ¶41(b).

STATEMENT OF THE CASE

This action for damages under 42 U.S.C. §§ 1983 and 1985 was brought in the United States District Court for the Middle District of Alabama, alleging violation of the plaintiff's rights secured to him under the FIRST, FIFTH, and FOURTEENTH AMENDMENTS to the United States Constitution. The plaintiff asserted[1] that the defendants, Henry B. Gray, III (then-Adjutant General of the State of Alabama), and Frances J. Cummings (a Major in the United States Army, acting as an officer for the Inspector General for the First United States Army), along with two defendants who were members of the Alabama legislature, Senator Fred R. Jones and Representative Alvin Holmes, acted individually and collectively (1) to deprive the plaintiff of his property rights in his non-probationary merit system

1. See Amended Complaint, Record 104.

position and his federal commission in the National Guard; (2) to deprive the plaintiff of his liberty interest in his good name; and (3) to punish the plaintiff for the exercise of rights secured to him under the FIRST AMENDMENT to the Constitution of the United States. The complaint sought compensatory damages for defamation and lost income, expenses incurred in protecting his rights, and for mental pain and anguish, as well as punitive damages.

Each of the four defendants filed motions for summary judgment.[2] The trial court entered an order granting summary judgment in favor of the defendants Gray and Cummings (sometimes herein referred to as the "executive defendants") upon grounds that, as a matter of law, they acted in good faith and had sustained their qualified immunity defenses.[3] In that same order, the trial court denied the motions for summary judgment

2. Record 24, 73, 125, 143, 269, 280, 319, 325.

3. See Appendix, pp. A25, A26.

filed by the defendant legislators Jones and Holmes (sometimes referred to as the "legislative defendants"). However, in so doing, the court ruled that, as a matter of law, the legislators were immune from liability for all those actions taken and statements made by them prior to the termination of a legislative committee's investigation of the Alabama National Guard.[4]

The Fifth Circuit Court of Appeals granted the parties' petitions for interlocutory appeals, and the plaintiff cross-appealed as to the legislative defendants, asserting that the court's immunization as to them was overbroad, since some of the actions of and statements by those legislators, although occurring during the course of the legislative investigation, were still not within the sphere of legitimate legislative activity.

The Fifth Circuit Court of Appeals affirmed the granting of summary judgments in

4. See Appendix, p. A22.

favor of the executive defendants, holding that there was no genuine issue of material fact as to whether they acted in good faith.[5] The Appeals Court reversed the trial court's denial of summary judgments sought by the legislative defendants. The appellate court agreed with the trial court that all the actions of the legislators taken during the pendency of the legislative committee were protected by legislative immunity.[6] The Fifth Circuit also held that the statements made by legislators defaming the plaintiff gave rise to no § 1983 cause of action under Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed 2d 405 (1976). Insofar as the legislators were alleged to have conspired with Gray to deprive the plaintiff of his property right in his job, the Court of Appeals observed that the plaintiff "has shown minimal contact between the executive and leg-

5. See Appendix, p. A48.

6. See Appendix, pp. 47-48.

islative defendants, with no butressing proof of the actual nature of the information conveyed."[7]

In order to permit this Court to assess the facts in this case as they relate to the law, it is necessary to review the evidence which was in the record supporting the plaintiff's case.

The plaintiff, William R. Cole, a federally-recognized Colonel in the Alabama Army National Guard, had served as Military Executive Officer in the Alabama Military Department for 14 years.[8] He was serving in that position in 1971 when the nation's decision to end the compulsory military draft created a serious problem for the military defense of our country. In that year, it suddenly became necessary for active military units, reserve units, and national guard units to aggres-

7. See Appendix, pp. A56-A57.

8. See Record, Plaintiff's Affidavit of June 30, 1978, at p. 1 (in separate binder).

sively seek to attract, secure, and retain necessary personnel to insure the nation's defense.[9]

The Alabama Army National Guard responded to this call in a most remarkable way. Its senior officers, including the plaintiff, put forth significant and successful efforts to insure that the Alabama guard would more than carry its share of the nation's responsibility to prepare for its defense.[10] Colonel Cole worked long hours in the evenings, on weekends, holidays, and at times when he was on annual leave to develop and implement an adequate recruiting and retention program.[11] He and other Alabama guard officers were paid for this overtime work from federal recruiting and retention funds.[12] The results of the work of the plaintiff and

9. Id., at p. 4.

10. Id., at pp. 5-6.

11. Record, pp. 661-662.

12. See Appendix, pp. A35-A36.

others were explosive. Alabama was recognized as the "guiding star" of all the states in the union in its recruiting program, and plaudits for the efforts of Colonel Cole and other senior members of the Alabama Army National Guard were legion.[13] The plaintiff's record of performance in this effort was rated outstanding in every way.[14]

At this point, Senator Jones made an abortive effort to secure for himself a promotion to brigadier general in the guard, and he blamed the denial of that promotion on the plaintiff and other Alabama guard officials.[15] As a result, Jones threatened the plaintiff with retribution.[16] Jones and Representative Holmes then spearheaded a legislative committee investigation into the

13. See Record, Plaintiff's Affidavit, June 30, 1978, at p. 6 (in separate binder).

14. Record, p. 432.

15. See Appendix, p. A42.

16. See Appendix, p. A42.

guard's activities.[17] During the investigation, Holmes and Jones discovered that the plaintiff and other high-ranking officers had been paid for a substantial number of extra duty days.[18] During the hearings, Jones stated that the extra duty payments were "squandered" funds, and "Holmes asserted that Cole did not work on all the days for which he received pay."[19] As this controversy was in progress, then-Adjutant General Rollo requested the Commanding General of the First United States Army to conduct an investigation, and the defendant Cummings was sent to Alabama to "conduct an official inquiry to determine the propriety of utilization of recruiting and retention funds by officials of

17. See Appendix, p. A36.

18. See Appendix, p. A37.

19. See Appendix, p. A37. During this time, the plaintiff testified that Jones told him confidentially that, if Cole did not "change sides," that "they" could get Cole's job. Record, Plaintiff's Affidavit, August 7, 1978, at p. 18.

the Alabama National Guard."[20]

Cummings' authority as an Inspector General investigator afforded him little or no discretion, since his responsibility was only to "thoroughly investigate the facts bearing upon a given situation and make an accurate, complete, and impartial report" without "even a semblance of injustice."[21]

Shortly after Cummings' arrival in Alabama in March of 1976, he met with Jones, Holmes and other members of the legislative

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20. See Appendix, p. A38; Record, 513.

21. See Appendix, pp. A68-A69; Record, 537. Cummings was obviously not impartial from the outset. While the plaintiff and his associates were struggling diligently to recruit more members for the guard, partially by advertising potential economic benefits of guard units to local communities, Cummings' attitude was that Alabama already had too many people in the National Guard and that there was something wrong about using potential economic benefits to encourage recruiting and retention. See Appendix, p. A43; Record, Cummings' Deposition, Vol. I, pp. 116-139; Record 471. Cummings' duty to "impartially" investigate the "propriety" of utilization of the recruiting funds was therefore a responsibility that he intentionally refused to accept, because he was not concerned with how much work was done by the plaintiff nor with the results of such work. See Cummings' Deposition, Vol. II, p. 107; Record, 471.

committee.[22] Cummings was aware of Jones' motive in wanting Cummings to uncover guard wrongdoings,[23] yet he listened to Jones and the other members of the committee, and had other subsequent discussions with Jones, and said he "would presume" that the plaintiff was mentioned in these conversations.[24]

The record clearly shows that Cummings accepted suggestions of Jones and reached a conclusion thereon in favor of Jones' position approximately two days later.[25] The contacts by the legislators with Cummings were admitted to be simply contacts "with another government agency," and Jones has admitted that the committee was "not interrogating or investigating" when it made such contacts and that "we did not look upon Major Cummings as a

22. See Appendix, pp. A38.

23. Record, Cummings Deposition, Vol. I, pp. 67-68, 73-74.

24. Record, Cummings Deposition, Vol. I, p. 75.

25. Record, 516-531.

witness."[26]

The legislative committee was dissolved on June 3, 1976,[27] and Cummings' report was filed on September 14, 1976.[28]

The Court of Appeals' opinion recites that Cummings' report of inquiry "levelled two basic charges against Cole: (1) that he excessively used man-days, receiving pay for work that was apparently not necessary, and (2) that he participated in defrauding the federal government out of hundreds of thousands of dollars annually in the method of issuing orders in the Alabama military department."[29] Cummings has admitted, however,

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26. Record, Jones Deposition, pp. 91-92.

27. Record, 478-479, 510.

28. See Appendix, p. A38.

29. See Appendix, pp. A38-A39. While these are accurate summaries of the charges, Cummings also reported that the plaintiff had "grossly abused the public trust and confidence" (Record, ROI pp. 15-16), that his motive was "personal avarice" (Record, ROI p. 6), and "greening [his] pockets" (Record, ROI p. 9), that he had engaged in conduct "intended to deceive" (Record, ROI p. 9), and that he was guilty of "vehement abdic[a]tion of responsibility." (Record, ROI pp. 5-9).

that at the time he wrote the report he had no facts to show that Alabama could have achieved the same results by spending less money.[30] As to the method of issuing orders, he knew that Alabama military regulations permitted the method used, and did not bother to determine that the federal National Guard Bureau had approved those regulations, saying that fact would have "made no difference."[31] A series of independent investigations into these allegations have all resulted in findings of no fraud and no wasting of federal funds.[32]

30. Record, 429; Cummings Deposition, Vol. III, p. 116.

31. Record, 434-435; Cummings Deposition, Vol. I, pp. 87-89.

32. A board of military officers examining a related case found that "there is no evidence to support a finding that large sums of federal money have been wasted" (R. 433, 474), and an independent hearing officer in another related case observed that "[n]o place in either of the Reports of Investigation or any of the testimony is there evidence to support any fraud." (Record, Exhibit 8 to Plaintiff's Affidavit of June 30, 1978, in separate binder). (Emphasis added).

Gray was sworn in as Adjutant General on March 25, 1977, and met with Jones at a luncheon meeting on the day before, March 24th.[33] The Court of Appeals has called Gray's attendance at this meeting "[t]he only allegation bearing the slightest potential damage to Gray's claim of good faith," and asserts that the plaintiff only speculates that he "must have been the subject of that conversation."[34] Although such speculation was perfectly logical, the remaining evidence in the record clearly demonstrates that Cole was in fact discussed on that occasion by Gray and Jones.[35] Also, Gray has testi-

33. Record, Gray Deposition, pp. 4-5, 41. This is the same luncheon meeting erroneously referred to in the Court of Appeals' decision as being April 24th. See Appendix, p. A49.

34. See Appendix, pp. A48-A49.

35. Jones only said "Colonel Cole's name could have possibly come up in the R. and R." on that occasion (Record, Jones Deposition, p. 61), but Gray specifically admitted that he told Jones on that occasion that he was considering suspending Cole from his job. Record, Gray's Deposition, pp. 44-45.

fied that Jones frequently came to his office and discussed the status of the adverse actions against Cole and the other officers,[36] and said that "[Jones] knew about as much about what was going on as I did."[37] Jones, however, denied having any conversation with Gray about the disciplinary action against Cole.[38]

Gray first suspended Cole from his merit system position, and then discharged him by letter dated April 20, 1977. The letter charged Cole with "gross abuse of the public trust and confidence," and observed that the allegations against Cole on pages 5-9 and 15-19 of the Report of Inquiry were fully supported by the evidence, that Cole had been guilty of conduct "in violation of [his] oath of office," that he had made or caused to be

36. Record, Gray Deposition, pp. 177-179.

37. Record, Gray Deposition, pp. 198-199.

38. Record, Jones Deposition, p. 63.

made "false or misleading statements to investigative officers and employees of the United States," that he had committed certain crimes in that he "knowingly and wilfully manipulated, misrepresented, falsified, or concealed material facts in connection with official documents," and finally, that he had acted in a manner contrary to his trust and "subversive of constitutional government."[39]

When Gray made these charges, he did not know of any law which Cole had violated, nor had he ever determined whether any of the charges in Cummings' report were correct.[40]

The Alabama personnel board convened to hear Gray's charges against Cole on June 30, 1977, when Gray's attorneys presented his case against Cole. The hearing was not completed on that day, but was continued until July 7, 1977, when Cole presented his case in rebut-

39. Record, 547-548.

40. Record, Gray Deposition, pp. 72-73, 83, 86.

tal.[41] On that date, even though Gray still had not investigated the evidence and had no knowledge of any evidence of fraud or illegal conduct on the part of Cole,[42] he wrote a letter to First United States Army, essentially repeating the same charges he had made in Cole's letter of dismissal, and asking that Cole's federal recognition as a Colonel in the National Guard be withdrawn.[43]

The charges in the dismissal letter were found not to be supported by the evidence at the personnel board hearing, and the board entered an order on July 28, 1977, reinstating Cole but denying him 33 days of back pay.[44] At or about the same period of time, independent hearing officers heard evidence in five related cases and all recom-

41. Record, Personnel Board Transcript, Exhibit 5 to Gray's verified Answer.

42. Record, Gray Deposition, pp. 85-86, 169.

43. Record, Gray Deposition, pp. 137-139.

44. See Appendix, p. A40; Record, 491-494.

mended reinstatement of the officers involved, but Gray, without knowing what evidence was before those officers, did not agree with their decisions and persisted in his efforts to further punish those officers.[45] When Governor Wallace directed Gray to reinstate three other officers and to seek cancellation of Gray's request that the federal recognition of those officers be withdrawn, Gray reluctantly complied.[46] He thought Cole should receive an additional suspension, however, and did not seek to cancel his request that Cole's federal recognition be withdrawn.[47]

During this time, the defendant Holmes telephoned Gray to inquire about the federal recognition settlements, and Gray told him that the governor had ordered him to seek can-

45. Record, Gray Deposition, pp. 201-210.

46. Record, Gray Deposition, pp. 193-198.

47. Record, Gray Deposition, pp. 195-196.

cellation of those requests.[48] Holmes then made a public statement that Cole and the other officers were "corrupt," were "criminals" and implied that they should be "behind bars."[49] Previously, at a public press conference, Holmes was quoted as saying he was opposed to the personnel board's decision to reinstate Cole, and called Cole the "most notorious racist out there."[50] After Cole's reinstatement, Gray had publicly stated that the occasion was "a sad day for honesty and integrity in government" and reduced Cole's responsibilities upon his reinstatement from those of a division chief to a branch chief within the division.[51]

Tne First United States Army did not cancel the hearings of the other officers upon

48. Record, Alvin Holmes Deposition, p. 54.

49. See Appendix, p. A46.

50. See Appendix, pp. A40-A41.

51. See Appendix, p. A40.

Gray's request, but instead went forward with its scheduled hearing on one of them, Major Hathorn. An independent Army Hearing Board found the evidence against Hathorn to be insufficient to sustain the charges against him, and subsequently First Army, sua sponte, cancelled all those proceedings, including the one against Cole.[52] During the Hathorn hearings, Jones made a public statement to the effect that "[t]he people out there that's on trial [implying Cole, who faced similar proceedings] are the ones that's done something wrong," and stated that those people "have been caught with their hands in the cookie jar."[53]

Just after the Hathorn hearings were concluded exonerating Hathorn, Holmes made a public statement saying: "The guy is guilty. Everybody who looks at the inspector general's

52. Record, 499-500, 561-563.

53. Record, 487-488.

report knows he is guilty. He should be punished."[54] Holmes, however, had never even seen the inspector general's report.[55]

54. Record, 544.

55. Record, 488; Alvin Holmes Deposition, p. 4.

ARGUMENT

1. Summary Judgment is improper where motive, intent, or subjective feelings must be determined either to establish the existence of a conspiracy to deprive one of constitutional rights or to establish a subjective good faith qualified immunity defense.

Albeit without addressing the standards for granting summary judgment, the trial court's opinion, as well as that of the Fifth Circuit, finds there to be no genuine issue of material fact in this case, and that, as a matter of law (1) the executive defendants acted in subjective good faith and (2) the legislative defendants did not conspire to deprive the plaintiff of his constitutional rights. Rule 56, F.R.C.P.

Under the "second branch" of the test laid down in Wood v. Strickland, 420 U.S. 308, 43 L.Ed 2d 214, 95 S.Ct. 992 (1975), this means that the lower courts have determined as a matter of law that the executive defendants did not act "with a 'malicious intention' to

deprive the plaintiff of a constitutional right or to cause him 'other injury.'" Procunier v. Navarette, 434 U.S. 555, 566, 55 L. Ed 2d 24, 33, 98 S.Ct. 855 (1978). See also, Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed 2d 90, 94 S.Ct. 1683 (1974).

This Court observed in Butz v. Economou, 438 U.S. 478, 508, 57 L.Ed 2d 895, 916-917, 98 S.Ct. 2894 (1978), that suits for damages involving constitutional violations need not always proceed to trial, but might in some instances be disposed of on a "properly supported motion for summary judgment based on the defense of immunity." This language led the Court of Appeals for the District of Columbia Circuit to the conclusion that this Court was recommending "resolution of the immunity issue, when possible, on summary judgment," even upon the question of subjective bad faith. See Halperin v. Kissinger, 606 F. 2d 1191, 1209 (D.C. Cir. 1979), cert. granted, _____ U.S. _____, 64 L.Ed 2d 807, _____ S.Ct. _ (1980). The Halperin court, however, ac-

knowledged that a pretrial inquiry into the subjective intent issue "frequently cannot be resolved without the direct testimony of those involved." 606 F.2d at 1209.[56] Of course, such caution has always been a hallmark in cases involving subjective intent and motive. For example, the Fifth Circuit in Slavin v. Curry, 574 F.2d 1256, 1267 (5th Cir. 1978), modified in part on other grds., 583 F. 2d 779 (5th Cir. 1978), quoted with approval the following language from Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 918 (7th Cir. 1974):

> "Cases in which the underlying issue is one of motivation, intent or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the

56. The court appropriately footnoted a quote from this Court's opinion in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L.Ed 2d 458, 464, 82 S.Ct. 486, 491 (1962), where it was observed that summary judgment "should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

issues turn on the credibility of the affiants."

In Imbler v. Pachtman, 424 U.S. 409, 419, 47 L.Ed 2d 128, 137, 96 S.Ct. 984, n. 13 (1976), this Court addressed the procedural distinctions between the qualified and absolute immunity defenses:

> "The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."[57] (Emphasis added).

57. The petitioner recognizes that Imbler was decided prior to Economou, and that this Court in Imbler was not addressing the distinctions between the "objective" and "subjective" qualified immunity defenses. The petitioner further concedes that the Halperin court was eminently correct when it asserted that the "objective" test can frequently be resolved at the pretrial stages while the "subjective" test cannot. However, this Court in Imbler was, in the petitioner's opinion, specifically reiterating the universally recognized inadvisability of disposing, on summary judgment, of an issue requiring examination into one's motive and subjective intent.

The petitioner does not believe that this Court, in its summary judgment suggestion in Butz v. Economou, supra, intended to admonish the lower courts to dispose of subjective good faith defenses on motions for summary judgment. The trial court in the instant case delved into the absolute immunity of the executive defendants,[58] and the parties consumed considerable space in their Fifth Circuit briefs arguing the absolute immunity issue. While the Fifth Circuit panel held the executive defendants were protected by qualified immunity,[59] its opinion is interspersed with comments tending to indicate that it believes absolute immunity applies.[60]

58. See Appendix, pp. A15-A16, A18, A24, A26.

59. See Appendix, p. A48.

60. E.g., "Gray was specifically charged by the governor with investigating the charges. He did exactly that, concluding that the actions complained of were abuses of significant magnitude to warrant discharge." See Appendix, p. A48.

"With regard to Cummings, the court found both investigation and report to have been conducted according

If absolute immunity did apply, this case would take on a significantly different posture, because we believe the Butz v. Economou "suggestion" does indeed encourage summary disposition in cases where officials "bear the burden of showing that public policy requires an exemption of that scope." Butz v. Economou, supra, 438 U.S. at 506, 57 L.Ed 2d at 916, 98 S.Ct. at _____. There is nothing, however, in the record establishing that the activities of these executive defendants even approached such a requirement.

In its finding that there is insufficient evidence in the record to establish an issue of fact as to whether the legislative defendants conspired with each other or with the executive defendants, the Fifth Circuit panel was in sharp disagreement with the trial court, which found an existing issue of fact as to the malice of the legislative defen-

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to orders and within the scope of official authority. We find no evidence to even hint at an opposite conclusion." See Appendix, p. A51.

dants,[61] as well as to the existence of a conspiracy.[62] The existence of a con-conspiracy, just as the issue of good faith, "is essentially a factual issue that the jury, not the trial judge, should decide." Adickes v. S. H. Kress and Company, 398 U.S. 144, 176, 26 L.Ed 2d 142, 164, 90 S.Ct. 1598 (1970); (separate concurring opinion of Justice Black). In Adickes, the petitioner had asserted that "although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses," and this Court concluded that "on the basis of this record, it was error to grant summary judgment." 398 U.S. at 157, 26

61. See Appendix, p. A23.

62. See Appendix, p. A11.

L.Ed 2d at 154, 90 S.Ct. at _____.[63]

For the reasons stated, the granting of summary judgment on the issue of the good faith of the executive defendants has involved an important question of federal law which has not been settled by this Court, making certiorari appropriate in this case under Supreme Court Rule 17.1(c). As to summary judgment in cases of conspiracy, the Court of Appeals has decided a federal question in conflict with the decisions of this Court, making certiorari

63. The various contacts of the defendants outlined in the Statement of the Case and in the opinions of the trial and appellate courts in this case constitute more evidence of a conspiracy than was shown in Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979). In Crowe, the court said:

> "This requirement [that the defendants agreed to commit an illegal act] must often be met by circumstantial evidence; conspirators rarely formulate their plans in ways susceptible of proof by direct evidence. (Citations omitted). The evidence here showed that the defendants had participated in private meetings at which Crowe was discussed. From this evidence and the testimony regarding the defendants' course of conduct toward Crowe, the jury could have inferred that a conspiracy existed."

595 F.2d at 993.

appropriate under the last clause of Rule 17.1(c).

2. Legislative immunity does not protect a state legislator from liability for actions taken outside the sphere of legitimate legislative activity, even though he may be engaging in legislatively related activity when he takes the action.

The Court of Appeals has correctly observed that the legislative committee upon which the legislative defendants served was dissolved on June 3, 1976.[64] The court, citing Tenney v. Brandhove, 341 U.S. 367, 376, 95 L.Ed 1019, 1027, 71 S.Ct. 783, 788 (1951), said:

> "Thus, we must conclude that the actions of Jones and Holmes taken during the pendency of the committee were protected by this rationale."[65]

In so holding, the court has overlooked an analysis of the particular activity the legislators were engaged in, and has held that all such actions taken during the pendency of the

64. See Appendix, p. A38.

65. See Appendix, p. A54.

committee were immunized unless "there was a usurpation of functions exclusively vested in the judiciary or the executive," quoting Tenney v. Brandhove, supra, 341 U.S. at 378, 95 L.Ed at 1028, 71 S.Ct. at 789.[66]

From a reading of the Fifth Circuit opinion, one can tell that "[d]uring the hearings, Jones stated that funds were 'squandered', and Holmes asserted that Cole did not work on all the days for which he received pay."[67] Since these statements were made during hearings in which the legislators were performing the "informing" function of securing facts for legislative purposes, the petitioner concedes that they are protected by legislative immunity.

However, the appellate court also observed that Cummings "was contacted by Senator Jones immediately on [his] arrival [in March of 1976], and met with him on several occa-

66. See Appendix, p. A54.

67. See Appendix, p. A37.

sions to discuss the charges."[68] These contacts, all made "during the pendency of the committee" were admitted by Jones to have had nothing to do with "informing" him or the committee members, but rather:

> "[W]e looked upon Major Cummings as another governmental agency, as we did the GAO and any other agency; and we were there to work with them and cooperate with them. We were not interrogating or investigating. We did not look upon Major Cummings as a witness."[69] (Emphasis added).

In Hutchinson v. Proxmire, 443 U.S. 111, 132-133, 61 L.Ed 2d 411, 429-430, 99 S.Ct.

68. See Appendix, p. A38. Actually, Cummings only met with Jones once, and that was in a meeting of the legislative committee at which Holmes was also in attendance, but Jones did telephone Cummings several times thereafter. Record, Cummings Deposition, Vol. I, pp. 6078. Jones (and to some extent, Holmes) suggested to Cummings several matters he wanted Cummings to investigate. See Record, Exhibit 9 to Plaintiff's Supplemental Affidavit of June 30, 1978 (in separate binder).

69. Record, Jones Deposition, pp. 91-92.

2675 (1979),[70] this Court dissected the two so-called "informing" functions. In the first sense, that of congressional efforts to inform itself through committee hearings, the function is within the sphere of legitimate legislative activity and is protected by immunity. However, Hutchinson flatly holds that the process of informing others about legislative activities "is not a part of the legislative function or the deliberations that make up the legislative process" and is therefore not protected by immunity. 443 U.S. at 133, 61 L.Ed 2d at 430, 99 S.Ct. at _____.

The contacts by Jones and Holmes with Cummings, even while the legislative committee was "pending," where they undertook to "cajole

70. Hutchinson was a case decided under the Speech or Debate Clause, and the Court of Appeals was correct in asserting (at Appendix, p. A53) that the Clause does not extend to a state legislator. See United States v. Gillock, 445 U.S. 360, 63 L.Ed 2d 454, 100 S.Ct. 1185 (1980). However, we believe the Fifth Circuit was also correct in asserting that the Tenney v. Brandhove (state legislative) immunity "is limited by the same considerations articulated in Hutchinson." See Appendix, p. A53.

and exhort with respect to the administration of a federal statute . . . is not protected legislative activity." Gravel v. United States, 408 U.S. 606, 625, 33 L.Ed 2d 583, 602, 92 S.Ct. 2614, 2627 (1972). Gravel emphasized that when the immunity protection is lost, it is because of the conduct engaged in and the specific involvement of the legislator. Thus, legislative committee members cannot suspend their investigative processes, "cajole and exhort" with a member of the executive branch, conduct an illegal conspiracy with him, and then claim the protection of legislative immunity from liability for their actions.[71]

The protection afforded the legislative defendants is in conflict with prior decisions of this Court, and certiorari is appropriate

71. Jones' threat made to the plaintiff regarding Jones' "promotion papers (see Appendix, p. A42), and his confidential admonition to the plaintiff to "chage sides" or "they" would get Cole's job (Record, Plaintiff's Affidavit, August 7, 1978, p. 18), both made before the committee was dissolved, are also not protected by legislative immunity.

under the last clause of Supreme Court Rule 17.1(c).

3. Paul v. Davis does not prohibit recovery of damages for defamation under 42 U.S.C. § 1983 when the defamatory remarks constitute a continuing assault on a property interest.

The plaintiff was ordered reinstated to his state merit system position on July 28, 1977, but back pay for 33 days was denied him at that time, he was reduced by Gray from a division chief to a branch chief within the division after that date, and Gray continued to seek to withdraw Cole's federal recognition after that date, the loss of which would have automatically disqualified Cole from holding his state merit system job.[71]

The Court of Appeals, citing Paul v. Davis, 424 U.S. 693, 47 L.Ed 2d 405, 96 S.Ct. 1155 (1976), held that "[i]nsofar as the complaint alleged an injury by defamation alone, referring to negative public statements made by the defendants, the district court was correct in finding no cause of action under the

71. Record, pp. 466, 504.

Civil Rights Act."[73] This appears to imply that any statements made by the defendants after the plaintiff was reinstated are not actionable under Paul. Paul simply held that prior cases of this Court did not "establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701, 47 L.Ed 2d at 405, 96 S.Ct. at _____.[74]

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73. See Appendix, p. A55. The plaintiff claimed damages for lost wages and expenses, as well as for mental pain and anguish, and punitive damages.

74. This Court observed in Paul that there were constitutional interests created by state law and others by the Bill of Rights which could add constitutional stature to a defamation claim, and also cautioned that "[o]ur discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action . . . ." 424 U.S. at 710, 47 L.Ed 2d at 419, 96 S.Ct. at _____, n. 5. Here the plaintiff has asserted punishment for the exercising of rights secured to him under the FIRST AMENDMENT, as well as the loss of property interests in his employment. Further, the plaintiff asserted that the actions of the defendants violated his substantive,

The Fifth Circuit has heretofore recognized that Paul is inapplicable where protected liberty and/or property interests are adversely affected by the challenged conduct and the defamatory statements are made in conjunction with that conduct, and has developed a "stigma-plus" test. See Moore v. Otero, 557 F.2d 435 (5th Cir. 1977). In Marrero v. City of Hialeah, 625 F.2d 499, 513 (5th Cir. 1980), the court discussed the "the Pale of Paul" and observed:

> "Thus, Paul simply holds that no liberty or property interest is infringed when the only loss suffered at the hands of the government is damage to personal reputation if personal reputation is not recognized by the relevant state law as a liberty or property interest." (Emphasis in original).

Citing Owen v. City of Independence, 445 U.S. 622, 63 L.Ed 2d 673, 100 S.Ct. 1398 (1980),

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as opposed to procedural, rights to due process of law.

the Marrero court observed:

> "Hence, it is now apparent that the defamatory communication need not cause the loss of the protected right, or more tangible interest, in order to satisfy the stigma-plus requirement of Paul. Instead, it is sufficient that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest . . . . In Owen, the defamation did not cause the employee's discharge; instead, the fact that the public perceived the charges to be connected to the discharge was sufficient to give rise to a liberty interest."

625 F.2d at 519. (Emphasis in original).

It was not until after all of the defamatory statements were made that Cole's employment was made safe when First United States Army dismissed the proceedings seeking to withdraw his federal recognition.[75]

In assuming that Cole's action after his reinstatement was for damages to his reputation alone, the appellate court overlooked the

75. Record, p. 563.

relevant facts that (1) Cole never did recoup 33 days of his salary; (2) his job status was reduced from a division chief to a branch chief within the division; (3) he faced loss of his employment throughout all of the events made the subject of this suit in that the defendants sought to deprive him of his federal recognition, which would have cost him his job; (4) the loss and threatened loss of his employment damaged his reputation, in addition to the statements made by the defendants; (5) Cole sought damages for mental anguish in addition to damages to his reputation; (6) Cole charged not only that his property interests in his employment were adversely affected, but also that he was punished for exercising rights secured to him under the FIRST AMENDMENT, and (7) that the defendants were engaged in a continued assault on Cole's property interest in his employment throughout the entire course of the proceedings.

Because the Court of Appeals' reliance upon Paul v. Davis is misplaced, the decision

is contrary to prior decisions of this Court, warranting certiorari under Supreme Court Rule 17.1(c).

4. A plaintiff alleging a deprivation of constitutional rights should not be denied full access to federal courts simply because he has utilized available administrative remedies and partially regained lost rights.

In closing remarks of the Fifth Circuit opinion in this case,[76] it said:

> "We close with the observation that the Civil rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state actions. In this instance, the political and governmental processes involved worked to investigate and resolve the allegations against Cole and, after the prescribed procedures had run their course, to restore him to his position.[77] There is no reason and no room for involvement

76. See Appendix, pp. A57-A58.

77. Cole was not totally restored to his position, see Appendix, p. A40, and, to the extent that he was, the defendants had no part in such restoration, but resisted it vigorously. Even "the recommendation that Cole's rank be withdrawn" was not, as the Fifth Circuit indicated, "dropped at the Governor's request" or upon Gray's action. See Appendix, p. A40. First U.S. Army, sua sponte, dropped such proceedings against Cole only after it could not prove Gray's charges against another officer. Record 499-500; 561-63.

on the part of a federal court."[78] (Emphasis added.)

It is inconceivable that one might be barred from a trial in a federal district court case under 42 U.S.C. § 1983 simply because he had prevailed in state and federal administrative processes and partially regained rights lost.[79]

78. It may be true that the federal courts should not be the forum for resolving every controversy surrounding state action assaults on protected property interests. E.g., Bishop v. Wood, 426 U.S. 341, 350-51, 48 L.Ed 2d 684, 693, 96 S.Ct. 2074 (1976). Conversely, however, the federal courts should not be so anxious to close their doors to "First Amendment rights to enforce constitutional rights through litigation" (N.A.A.C.P. v. Button, 371 U.S. 415, 440, 9 L.Ed 2d 405, 422, 83 S.Ct. 328 [1963]), especially since "[f]undamental rights implicit in the concept of ordered liberty, include . . . the right of access to the courts...." Sotto v. Wainwright, 601 F.2d 184, 190-91 (5th Cir. 1979.

79. The Fifth Circuit's recent controversial en banc majority decision in Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1980), held that a § 1983 plaintiff must exhaust his administrative remedies before instituting his action. It might well be said that the rationale in that case, combined with the decision here, can effectively "whip-saw" out of existence a federal claim under § 1983 where the plaintiff is partially successful at the administrative level. A petition for writ of certiorari in Patsy is presently pending in this Court.

Resort to the "political and governmental processes" by Cole in this case did not afford him anything close to the remedies available under § 1983. See Carlson v. Green, 446 U.S. 14, 64 L.Ed 2d 15, 100 S.Ct. 1468 (1980). "A damages remedy against the offending individual is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ." Owen v. City of Independence, 445 U.S. 622, 63 L.Ed 2d 673, 693, 100 S.Ct. 1398 (1980).[80]

80. In Davis v. Passman, 442 U.S. 228, 248, 60 L.Ed 2d 846, 864, 99 S.Ct. 2264 (1979), after holding that federal actions could be brought directly under the FIFTH AMENDMENT, the Court observed that "were Congress to create equally effective alternative remedies, the need for a damages relief might be obviated."

In Bush v. Lucas, 598 F.2d 958, 961, reh. den., 605 F.2d 554 (5th Cir. 1979), it was held that a demoted federal employee who "was administratively restored to his original status from the date of the adverse personnel action" could not maintain an action under the FIFTH AMENDMENT since he had utilized the available alternative administrative review opportunities. The Supreme Court vacated the judgment for further consideration in light of Carlson v. Green, 446 U.S. 14, 64 L.Ed 2d 15, 100 S.Ct. 1468 (1980). See Bush v. Lucas, 446 U.S. 914, 64 L.Ed 2d 268, 100 S.Ct. 1846 (1980). In Carlson, the Court had held that the Federal Tort Claims Act did not afford an "equally ef-

In Gomez v. Toledo, _____ U.S. _____, 64 L.Ed 2d 572, _____ S.Ct. _____ (1980), a Puerto Rican policeman alleged in a § 1983 complaint that he had been discharged from his position without a pretermination hearing and he was subsequently reinstated with back pay after a posttermination hearing. He brought suit for damages for violation of his procedural due process[81] rights, claiming damages to his reputation. The Supreme Court, although actually dealing with the question of whether the plaintiff must allege in his complaint that the defendant acted in bad faith,

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fective alternative remedy" to a constitutional tort action, because a trial by jury and the possibility of recovering compensatory and punitive damages against individual defendants under the constitutional action were more apropriate remedies, and observed that there was a need for uniformity in the protection of constitutional rights.

81. Here, Cole is not claiming a deprivation of rights to procedural due process, but relies upon allegations that he was arbitrarily and unreasonably treated in his discharge, demotion, and defamation relating to his official duties in violation of his substantive due process rights, and that he was punished for the exercise of rights guaranteed to him under the FIRST AMENDMENT.

nonetheless held that the complaint stated a cause of action. Cf., Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., Thompson v. Turner, _____ U.S. _____, 66 L.Ed 2d 245, _____ S.Ct. _____ (1980).

The direction being taken in the embryonic formation of causes of action brought against federal officials directly under the Constitution under the doctrine of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L.Ed 2d 619, 91 S.Ct. 1999 (1971), seems to be liberally weighted toward allowing a plaintiff to proceed under that doctrine in spite of the availability of alternative and less appropriate remedies, and in spite of the fact that a plaintiff may have availed himself of those remedies.[82]

In the case of this § 1983 plaintiff,[83], however, without even examining

82. See Footnote 80, ante.

83. The defendant Cummings, a federal official, is actually sued directly under the FIFTH and FIRST AMEND-

the effectiveness of the alternative remedies, the Fifth Circuit has sweepingly held that, since Cole has been restored to his position, "[t]here is no reason and no room for involvement on the part of the federal court."

There is no ascertainable logic for making any distinction between the availability and use of alternative remedies by a Bivens-type plaintiff and a § 1983 plaintiff. See Butz v. Economou, 438 U.S. 478, 504, 57 L.Ed 2d 895, 914, 98 S.Ct. 2894 (1978).

Since the issue raised in this portion of the argument has never been decided by this Court and is of significant importance, certiorari is appropriate under Supreme Court Rule 17.1(c).

MENTS in this case, as well as under § 1983 insofar as he acted in concert with state officials.

5. The FIRST AMENDMENT guarantees the right to advocate a strong military defense and to work toward that end, and punishment of the exercise of that right is violative of the amendment's proscription.

Although a panorama of cases could be cited for this argument, a fair summary is found in Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464, 60 L.Ed 2d 360, 99 S.Ct. 1826 (1979):

> "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. NAACP v Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328 (1963); Eastern Railroad Presidents Conf. v Noerr Motor Freight, Inc., 365 US 127, 5 L Ed 2d 464, 81 S Ct 523 (1961). The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, NAACP v Button, supra, or by imposing sanctions for the expression of particular views it opposes, e.g., Brandenburg v Ohio, 395 US 444, 23 L Ed 2d 430, 89 S Ct 1827, 48 Ohio Ops 2d 320 (1969); Garrison v Louisiana, 379 US 64, 13 L Ed 2d 125, 85 S Ct 209 (1964).

The Fifth Circuit panel has said "there is not one iota of substantiation for [Cole's] allegation that he was fired in retaliation for utterances protected by the First Amendment."[84] Conversely, the record establishes that the plaintiff continually espoused the cause of enlarging the Alabama Army National Guard in support of his political belief in a strong national defense.[85] He worked long hours in support of that belief, and produced significant results.[86] The defendant Cummings did not share that belief, and expressed his disagreement with that belief when he wrote his report.[87] Cummings has admitted that he was not interested in whether Cole's work and contributions to

84. See Appendix, p. A56.

85. Record, Plaintiff's Affidavit, June 30, 1978, at p. 8 (in separate binder).

86. Record, pp. 661-662.

87. See Appendix, p. A43; Record, pp. 428, 471; Cummings Deposition, Vol. I, pp. 116-139. Cummings was highly critical of the plaintiff's efforts toward in-

the recruiting program were successful, but has said "the value of the work is not in question."[88] Jones testified that the plaintiff "ought to be punished no matter how much [he] worked and no matter how much [he] produced."[89]

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creasing the size of the National Guard. On page 7, ¶32, of the ROI, he said, "In view of the not unlimited resources available within Alabama, one must necessarily question the motivations behind decisions which resulted in substantial increases in authorized strength at a time when the ARNG units as a whole were experiencing difficulty maintaining their authorized requirements." Record, 428. Cummings was puzzled by the fact that Alabama was expanding so rapidly even though the state program was already "enjoying moderate success." Record, 428. He also reported that "[b]ased upon subsequent developments, there is absolutely no question that Alabama could have easily maintained its authorized strength with reasonable effort and reasonabale expenses." Record, ROI, p. 6, ¶30, Exhibit 1 to Gray's Verified Answer. These statements, among numerous others, clearly establish that Cummings' report was aimed at curtailing the beliefs and efforts of the plaintiff and others to work to expand the size of the Alabama National Guard. The plaintiff insists that he had a FIRST AMENDMENT right to perform his job and stand for his beliefs in his work. None of the defendants had a license to punish him for the exercise of those rights.

88. Record, 471; Cummings Deposition Vol. II, p. 107.

89. Record, Jones Deposition, pp. 66-67.

Gray testified that he had never examined the results of the extra work done by Cole to determine whether it was productive.[90]

The state personnel board summed up the basic charge against Cole as follows:

> "However, the Report does not state, nor does any other evidence presented at this hearing show, that Colonel Cole or other officers violated any law or National Guard policy, rule or regulation by such utilization of recruiting Man-day Spaces, i.e., by serving on active duty on weekends and holidays to perform recruiting work, nor is there any allegation or proof that Colonel Cole did not in fact work on those days on which he was on active duty. Rather, the charge is essentially that he worked more than he should have worked. It seems clear that in so doing he was acting within his authority and with at least the tacit approval of his superiors, both in the Alabama State Military Department and in the National Guard Bureau.[91] (Emphasis added).

90. Record, Gray Deposition, pp. 70-71.

91. Record, pp. 64, 496-497, Exhibit 8 to Gray's Verified Answer.

While great emphasis has been placed upon the alleged "excessive" use of man-day spaces, it defies imagination that not one of the defendants has ever bothered to examine the results of that work, which everyone admits was long, arduous, and expensive. Cole's evidence that his work substantially and directly contributed to the tremendous success of the Alabama recruiting and retention program stands unrebutted.[92]

Another FIRST AMENDMENT factor in this case is that Jones intended to punish Cole for Cole's role in forwarding his promotion papers to the National Guard Bureau, and Jones' threat made to the plaintiff recorded in the Fifth Circuit's opinion expresses that intent.[93] Also, Jones told the plaintiff that if he did not "change sides," he knew

92. Record, p. 459 (Affidavit of Arthur U. Hathorn); Record, Plaintiff's Affidavit, June 30, 1978, at pp. 2-7 (in separate binder).

93. See Appendix, p. A42.

"they" could get Cole's job.[94]

With this evidence in the record it is difficult to understand how the Fifth Circuit panel could have found not "one iota" of substantiation for Cole's FIRST AMENDMENT claim. Certainly, there was sufficient evidence from which a jury could have determined that Cole's protected speech and activity played a "substantial role" in the defendants' decisions to accuse him of wrongdoing and seek to discharge him. See Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L.Ed 2d 619, 99 S.Ct. 693 (1979); Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 50 L.Ed 2d 471, 97 S.Ct. 568 (1977).[95]

Because the Fifth Circuit opinion is contrary to prior decisions of this Court regard-

94. Record, Plaintiff's Affidavit, August 7, 1978, p. 18.

95. Since whether the defendants' actions were motivated by a desire to punish Cole for the exercise of FIRST AMENDMENT rights is a question of motive, intent, or subjective feelings, what has been said in paragraph 1 of the argument portion of this petition would also apply to this issue.

ing FIRST AMENDMENT protection, certiorari is appropriate under the last clause of Supreme Court Rule 17.1(c).

This case presents questions of significant national importance involving the propriety of an all-volunteer Army versus the compulsory draft and the significant work and accomplishments that have gone into the recruiting and retention program. Whether the defendants made intentionally false allegations against one who thought he was working in accordance with law and in the national interest is an issue considered to be peculiarly appropriate for a federal judicial forum to decide. For these and the foregoing reasons, it is respectfully requested that this Honorable Court will grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the questions presented herein.

Respectfully submitted,

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* * * * * * * * * * * * * * * *

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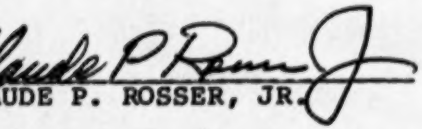

CLAUDE P. ROSSER, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Petition of William R. Cole for Writ of Certiorari upon Honorable Wade McCree, Solicitor General of the United States, Honorable William B. Moore, Jr., Honorable Robert D. Segall, Honorable Sarah Greenhaw, Honorable Sterling Culpepper, and the Deputy Assistant Judge Advocate of the Department of the Army, Attorneys for the Respondents-Defendants, by placing said copies in the United States Mail, postage prepaid,

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THIS the 29th day of JUNE, 1981.

Claude P Kenner Jr
NOTARY PUBLIC

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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* * * * * * * * * * * * * * * * *

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INDEX TO APPENDIX

PAGES

OPINION OF THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA ENTERED DECEMBER 11, 1978.....A1

JUDGMENT OF THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA ENTERED DECEMBER 11, 1978.....A28

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT GRANTING PETITIONS FOR INTERLOCUTORY APPEAL.....A31

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT RENDERED MARCH 2, 1981.....A33

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC ENTERED MARCH 31, 1981.....A59

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERED MARCH 2, 1981; ISSUED AS MANDATE APRIL 29, 1981.....A62

UNITED STATES CONSTITUTION, FIRST AMENDMENT.....A65

PAGES

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT.....A65

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT.....A65

42 U.S.C. §1983.....A65

42 U.S.C. §1985(3).....A66

ARMY REGULATION 20-1, 25
OCTOBER 1974, CHAPTER 4,
¶4-2.....A66

DEPARTMENT OF THE ARMY
TECHNICAL BULLETIN, TB-IG4,
INSPECTOR GENERAL GUIDANCE
MATERIAL, AUGUST 1967:
§1, ¶14.....A67
§1, ¶15.....A68
§V, ¶41(b).....A69

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM R. COLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	78-83-N
HENRY B. GRAY,III,	)	
Etc.; ET AL,	)	FILED
	)	DEC 11 9:05 AM 1978
Defendants.	)	JANE P. GORDON, CLERK
		U.S. DISTRICT COURT
		MIDDLE DISTRICT OF ALA.
		DEPUTY CLERK

MEMORANDUM OPINION

This cause is submitted on Defendants' motions for summary judgment, affidavits and depositions, and brief of all parties. Plaintiff sues for relief under 42 U.S.C. 1983, 1985, for conspirary [sic] to cause his loss of his job as a colonel in the Alabama National Guard and for loss of that job.

Based on undenied evidence in the file, this Court finds that Defendants, Senator Jones and Representative Holmes, during and after an Alabama legislative investigation of

the Alabama National Guard's alleged misuse of federal funds, made statements which may be argued to have been intended to cause the Plaintiff to lose his job; that Defendant Cummings, a regular Army investigator, was ordered to Alabama "to determine the propriety of utilization of (federal) recruiting and retention funds by officials of the Alabama National Guard;" and that Defendant, Major General Gray, relieved the Plaintiff of his National Guard commission and recommended that the Plaintiff's regular Army commission be terminated.

Defendant Cummings conducted an investigation and found that it was an Alabama National Guard practice well known to the Plaintiff that certain National Guard regulations were disregarded. Guardsmen, governed by a regulation that recruiting and retention be done only after having previously been ordered to do the same, would, in violation of said regulation, record overtime work in recruiting and retention and thereafter have orders

therefor entered with the approval of Plaintiff Cole. Cummings also found that Cole was aware that officers of the National Guard, while subject to regulations that overtime could be served only on days when they had not previously been on full-time duty and only on days when they served at least eight hours at recruiting and retention, would serve hours on days when they served full-time duty and claim overtime for the aggregate of such hours on other days. Thereafter, Defendant Cummings, after itemizing many of such violations of regulations, reported that Plaintiff Cole "grossly abused the public trust and confidence" placed in him "by taking repeated advantage of an inadequately controlled program" in being paid for overtime work and of "greening *** the pockets" of the Plaintiff and other officials and that the Plaintiff was guilty of "vehement abdication" of responsibility in allowing the itemized violations of regulations to result in what "literally constituted a fraud against the federal govern

ment amounting to several hundred thousand dollars annually." Defendant Cummings recognized that the recruiting and retention by the Alabama National Guard was outstanding but reported that "from all indications, *** the ultimate cost *** would have been substantially less" had the regulations not been violated. Cummings recommended the dischage of other National Guard officers but not of the Plaintiff.

The Plaintiff sues for being deprived of his job for a short time and for the accompanying bad publicity associated with the report of Defendant Cummings and the remarks of the other Defendants associated therewith.

Defendant Gray is charged with having discharged the Plaintiff for having violated the regulations; with having compared the Plaintiff to a "rotten apple in the barrel"; and with having made the statement that the day of reinstatement of the Plaintiff and other National Guard officers to their State merit system positions was "a sad day for hon-

esty and integrity in government". Defendant Gray, in his letter dismissing the Plaintiff from his State merit system job with the Alabama National Guard, stated that the Plaintiff had "abused the public trust and confidence", had violated his oath of office, had made "false and misleading statements to investigative officers", had "knowingly falsely" certified records, had been guilty of criminal conduct in that he "knowingly and willfully manipulated, misrepresented, falsified, and concealed material facts in connection with official documents," and had "acted in a manner *** subversive to constitutional government." In asking the First United States Army to strip the Plaintiff of his federal recognition as a colonel in the Army National Guard, Defendant Gray charged the Plaintiff with "substandard performance and moral and professional dereliction," abuse of the recruiting and retention program "for his personal benefit, violation/abuse/circumvention of the policies/intent of appropriate State and/or fed-

eral laws, disregard for established regulations and policies, failure to properly perform duties, misrepresentation of material facts, displaying defective attitudes towards duties, abuse of the public trust and confidence, conduct unbecoming an officer," and "bringing discredit upon the Army National Guard."

In regard to the amount of overtime claimed by Plaintiff Cole, and it is significant that he claimed as much as 458 days' work during at least one of the years in question and over 400 days' work for each of several other years, it is clear that it is legal for a National Guardsman to work on Saturdays and Sundays of a week where he has worked all prior days of the week and to receive four days' credit for the two days' overtime work. If this is done after the guardsman is ordered to do that work, it is entirely legal for him to claim 11 days of work for each week, and he could, therefore, legally claim 458 days during a year. The primary significance of the

amount of overtime work is that it created suspicion that the guardsman in question had no reason to work so much overtime and that, since he had violated the regulations in claiming overtime without prior orders to work overtime and since he had aggregated overtime or approved aggregation of overtime on days when he had already worked full time, all in violation of regulations, the excessive amount of overtime might be a suspicious circumstance from which one could guess that the claim for overtime had been padded. However, it is clear that the parties to this suit do not insist that there is competent evidence of padding of overtime, and they are satisfied to base their case purely on the violation of regulations. This was the cause for the disciplinary actions taken against the Plaintiff.

The Defendants realize that they have no way to prove whether or not Plaintiff Cole actually spent as much time as he was paid for in recruiting and retention, and they do not make an issue of that question. They do, how-

ever, point to their suspicions of overtime claimed but not actually worked in justifying the very regulation which they insist, and it is admitted, that Plaintiff Cole either violated or tacitly approved violations of, that is, the logging of overtime prior to the same having been ordered.

It is agreed by all parties that the suspension and ultimate dismissal of Plaintiff Cole and his subsequent reinstatement was a part of an overall disciplinary action taken against 14 of the higher ranking Alabama Army National Guard officers for an Alabama guard-wide policy of violating certain regulations.

Plaintiff Cole insists that the disagreement between the Cole-Rollo faction, as to what Plaintiff insists is a strong National Guard, and the Cummings faction, which the Plaintiff calls a weak National Guard philosophy, is indicative of the basis for the alleged conspiracy to unseat the Cole faction from the higher positions in the State Na-

tional Guard. See, Griffin v. Breckenridge, 403 U.S. 88.

Some of the Defendants insist that there could have been no conspiracy since some of the alleged conspirators did not even see or talk to others for long periods of time during the pendency of the alleged conspiracy, and there is no substantial direct evidence of the conspiracy.

Proof of knowledge of a conspiracy must be clear and unequivocal, but it is not necessary to show that a conspirator had knowledge of every element of the conspiracy, United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969). It is not necessary in establishing an unlawful conspiracy that any simultaneous action or agreement on the part of each conspirator be shown, Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F.Supp. 51, 77, reversed on other grounds 388 F.2d 25, affm'd. in part, reversed in part on other grounds 395 U.S. 100. It is not necessary to prove that each conspirator knew the exact limits of the

illegal plan or that each knew the identity of all of the participants in the scheme. A single plan should be shown, the essential nature and general scope of which was known to each conspirator though he need not know every element of the general plan. Hoffman-LaRoche, Inc. v. Greenburg, 447 F.2d 872, 875; Koehler v. Cummings, 380 F.Supp. 1294, 1313.

> "*** (C)onspiracies involving *** elaborate arrangements generally are not born fully grown. Rather, they mature by successive stages which are necessasry to bring in the essential parties. And not all of those joining in the earlier states make known their participation to others later coming in. The law does not demand proof" that all conspirators know about the acts of all other conspirators. "For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The law allows the conviction of those actually discovered without requiring evidence of knowledge of all its details or of the participation of others." Blumenthal v.

United States, 332 U.S. 539, 557 (1947).

This Court is of the opinion that this case involves evidence supporting an issue of fact as to whether the alleged conspiracy existed and whether the Defendants were party thereto.

OFFICIAL IMMUNITY

The Defendants all contend that they were immune by their official status from suit for their actions charged against them in this proceeding. Immunity has generally been recognized where the plaintiff is seeking to obtain government funds to obtain property in the government's possession or to control the disposition of property in the government's possession. Great Northern Life Ins. Co. v. Read, 322 U.S. 47; Carolina Glass Co. v. South Carolina, 240 U.S. 305; Murray v. Wilson Distilling Co., 213 U.S. 151; Hagood v. So., 117

U.S. 53; Louisiana v. Jumel, 107 U.S. 711. Courts have gone to great lengths to shield federal officials on occasion from liability for their acts within the scope of their authority. In Gregoire v. Biddle, 177 F.2d 579, 581, cert.den. 339 U.S. 949, the plaintiff, suspected of being a German enemy agent during World War II, was arrested and confined for many months by order of the Attorney General of the United States and brought suit for deprival of his liberty without due process of law since he was neither charged with a crime nor given an opportunity for a hearing during all the period of time of his confinement. In Norton v. McShane, 332 F.2d 855, cert.den. 380 U.S. 981, plaintiffs, suspected of wanting to lend aid and comfort to the riots at the University of Mississippi when blacks were ordered admitted to that University, were arrested and held without benefit of having been charged or given a hearing as to any criminal activity. These two suits against the high Department of Justice officials were dismissed

on motion for summary judgment on the basis of the official immunity of the federal officials so charged. In both of these cases, federal officials had obviously violated the constitutional right of the plaintiffs not to be deprived of their liberty without due process of law, but basing a defense on the doctrine of official immunity, the courts declined relief to the plaintiffs. For an apparently opposite conclusion, see Kelley v. Dunne, 344 F.2d 129, reversing 230 F.Supp. 969, where a federal game warden similarly charged with constitutional encroachments was not found immune to suit. In Ex parte Young, 209 U.S. 123 (1908), the court relied on the fact that a State officer was "stripped of his official or representative character" by his unconstitutional conduct. In that case, the court allowed prospective relief in the form of an injunction but not retroactive relief in the form of damages.

The case of Ex parte Young, supra, enunciated the principle that the Eleventh Amend-

ment provided no shield for a State official confronted by a claim that he had deprived another of a federal right under the color of State law. The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232 (1973), demonstrates that State officers, who reasonably believe in good faith that their action is legal, have a qualified immunity from suit for their unconstitutional acts done within the scope of their authority. This doctrine places the burden on the defendant of proving that the defendant reasonably believed in good faith that his action was constitutional. The Supreme Court in Butz v. Economou, 46 U.S.L.W. 4952, 4958, _____ U.S. _____, held that policies of immunity applicable to State officials are also applicable to federal officials. It would, therefore, see that, where a federal official is charged with violating the constitutional right of an individual within the scope of his official authority, he is immune to suit therefor if he can establish by a preponderance of the evidence that he had a reasonable

belief in good faith that his action was constitutional.

The case of Butz v. Economou, supra, is relevant to this cause additionally in that it recognizes the need for unqualified or absolute immunity to officials where absolute immunity is essential to the conduct of the particular public business. This immunity is granted to court and administrative officials where those officials are affording judicial or quasi-judicial hearings to individuals.[1] That immunity is applicable to administrative law judges, hearing officers, agency officials performing functions analogous to those of prosecutor, and agency personnel who present evidence on the record in the course of adjudication. Butz v. Economou, supra, (at page 4963 in Rehnquist Opinion). Defendant Gray

1/ Judicial immunity is unqualified, Bradley v. Fisher, 13 Wall (80 US) 335; Pierson v. Ray, 386 U.S. 347; and is extended to prosecutors, Yaselli v. Goff, 275 U.S. 503; Imbler v. Pachtman, 424 U.S. 409.

likens his acts in this case to those of a hearing officer, and Defendant Cummings claims the immunity of agency personnel who presents evidence on the record in the course of adjudication.

The case of Paul v. Davis, 424 U.S. 693, indicates that one's good name, as smeared by defamation, is not a liberty or property interest for which a protection is provided by 42 U.S.C. §§1983, et seq., or the Due Process Clause of the United STates Constitution. Defendants in this cause, however, are charged with conspiring to cause Plaintiff Cole to lose his job, a property interest, and with spreading defamatory information which would naturally tend toward causing the loss of that job. This is, therefore, mor than a defamation action, and the Plaintiff contends that the loss of a job for the period of time that the Plaintiff was suspended or discharged without pay justifies consideration of this suit. If the Plaintiff has a cause of action for loss of his job, the fact that other agen-

cies restored his job is relevant only to the question of damages.

All Defendants are public officials. To the extent that they were acting within the scope of their authority as public officials and did not violate the constitutional rights of the Plaintiff, they are absolutely immune from suit. They are not responsible for damages caused by their attending to their official functions within their constitutional authority. It is necessary that public functions be freely exercised without fear of suits, and he who is harmed thereby must bear his own harm. The Supreme Court in Scheuer v. Rhodes, supra, at 240, recognizes that immunity is based on two "independent rationales":

> "(1) The injustice, particularly in absence of bad faith, of subjecting to liability an officer who is required by the legal obligation of his position, to exercise discretion;
>
> "(2) The danger that the threat of such liability would deter his willingness to execute his office with

the decisiveness and judgment required by the public good."

If a public official acts outside of his official authority, anyone damaged thereby may have a suit for damages proximately resulting therefrom. If the public official acts within the scope of his official authority and absolute immunity is essential for the conduct of the particular public business, the official is absolutely immune even if his act violates constitutional rights of the plaintiff. Butz v. Economou, supra, 46 U.S.L.W. at 4960. If he acts wihin the scope of his authority but thereby violates the constitutional rights of a claimant and absolute immunity is not essential for the conduct of the particular public business, the defendant is qualifiedly immune and has the burden of showing that his unconstitutional actions were done in good faith with a reasonable belief that he acted constitutionally therein.

A judicial officer, in the act of judging, may lose his temper with one of the lawyers. He may constitutionally fine him and put him in jail for contempt of court or he may take his gavel and strike the attorney, thereby acting unconstitutionally and beyond the scope of his employment. The fine or incarceration for contempt of court is a judicial act and is constitutional even though it may exceed the legal limits therefor. The striking of the attorney is outside of the scope of judicial authority and is an unconstitutional summary punishment for which the judge may be sued for damages. He may, however, escape liability therefor if he is able to establish by a preponderance of the evidence that he acted in good faith believing that he acted within the scope of his authority and that he acted constitutionally. An example would be where the judge in good faith reasonably believed that he was acting in self-defense.

As to a member of the legislative branch of government (such as Senator Jones or Representative Holmes), a legislator or congressman is acting within the scope of his official authority and immune from suit if he is doing an act delegated by law to the legislative branch. Clearly, any discussion of a proposed law on the floor of the Legislature or in a committee meeting is a proper legislative function. Investigation is an appropriate auxiliary to the legislative function when the information sought from material witnesses furthers the subject of proposed legislation. However, immunity does not attach to improper dissemination of defamatory information outside the legislative process. Hutchinson v. Proxmire, 579 F.2d 1027 (7 CAA 1978). A member of Congress may call persons to investigate rumors that a judge had struck a lawyer with his gavel if Congress were bona fidely considering passing a law against judges' assaulting lawyers in federal courthouses; however, he would not be immune to suit for dam-

ages for notifying the newspaper of a false rumor thereof if Congress were not considering taking action thereon. While the public and a legislative officer's colleagues have a legitimate right to know what actually occurs on the floor of the legislative branch which is consistent with official immunity of persons releasing such information to news source groups, that fact would not justify a legislator's maliciously or voluntarily spreading false information calculated to cause the discharge of a member of another branch of the government when the spreading is not consistent with a legislative purpose. The distribution outside of the Legislature must serve some legitimate legislative need in order to afford the distributor immunity from suit. Remarks, calculated to cause discharge or demotion of a public employee, which are made on radio, television or in private communications by a legislative officer, while the Legislature is not considering the questions involved, are not made within the scope of leg-

islative authority, Hutchinson v. Proxmire, supra, and are not ordinarily necessary to carry out the legislative function of informing the public and, therefore, ordinarily are not afforded immunity from suit.

It is, therefore, the opinion of this Court that the actions of the legislative officers in this cause in discussing this case and in making any statements about the Plaintiff in this cause prior to the time the Legislature stopped investigating the matter were privileged and that they may be admitted in evidence only for the purpose of showing the conspiracy or malice or bad faith of Defendants Jones and Holmes and not for any other purpose whatsoever. However, this Court is of the opinion that there is no undenied evidence that any distribution of information by Defendants Jones and Holmes after termination of the legislative investigation of the Alabama National Guard was essential for the conduct of the public business of legislating. There is also no undenied evidence before this Court

that statements or agreements made thereafter by Jones or Holmes were made in the scope of the official authority of said Defendants Jones and Holmes or that they were made in good faith with the reasonable belief that they were not acting unconstitutionally. The element of malice of Jones and Holmes is a further material issue of fact in this cause.[2] Accordingly, Defendants Jones and Holmes' (the legislative Defendants) motion for summary judgment should be denied.

This Court is further of the opinion that Defendant Gray, acting upon the report of Defendant Cummings to the effect that the National Guard officers in question had violated

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2/ The First Amendment privilege of free speech and press insures that one, absent malice, may freely discuss public officials without fear of a defamation suit. New York Times v. Sullivan, 376 U.S. 254. This Court is of the opinion that the same reasoning would require proof of malice in the instant case. Plaintiff Cole was a public person by virtue of his high position in the Alabama National Guard as well as by the great public interest created therein by evidence of alleged improprieties practiced therein.

certain regulations, had an official duty to determine whether or not they should be discharged or whether or not they should be recommended for stripping of their federal rank and that any action that Defendant Gray took in regard to removing said officers from the State National Guard and recommending stripping of their Army rank was within the scope of his official authority as Commander of the Alabama National Guard. There is and can be no evidence to the contrary, and this Court is, therefore, of the opinion that Defendant Gray was acting constitutionally within the scope of his official authority and is immune from suit. This is not altered by the fact that Gray made possibly defamatory statements about Cole after the Personnel Board of Alabama reinstated him. The effect of the reinstatement after loss of 33 days' pay was to approve a penalty of Cole for his indiscretions but to disapprove the severity thereof. Small punishments of Cole, such as the deprival of his key to his offices, were approved

by the Board as reasonable punishment of Cole and, in any event, fall within the ambit of Butz v. Economou, supra, 46 U.S.L.W. 4952, 4960, as follows:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading."

This Court is aware of the admonition of the Supreme Court that:

> "Orderly Government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army be scrupulous not to intervene in Judicial matters." Orloff v. Willoughby, 345 U.S. 83 (1953). See, also, Gilligan v. Morgan, 413 U.S. 1, 10; Schlesinger v. Councilman, 420 U.S. 738; McLucas v. DeChamplain, 421 U.S. 21.

In any event, all evidence indicates that Gray reasonably relieved in good faith that his actions were proper. Scheuer v. Rhodes, supra. To the extent that Gray's statements (made after reinstatement of Cole to his rank) may

have applied to Cole, they did not contribute to a loss of Cole's property and are actionable, if at all, only in the State Court for defamation. Paul v. Davis, supra. Accordingly, Gray's motion for summary judgment will be granted.

This Court is further of the opinion that Defendant Cummings, in investigating the case and in reporting to his superior officers what he found and his opinions and recommendations based thereon[3], all as he was ordered, was also acting within the scope of his official authority and that his motion for summary judgment should, therefore, be granted. The Court fnds no evidence to the contrary. Nothing herein should be construed as a finding by this Court that either Defendant Gray or Defendant Cummings were correct or incorrect in

3/ Cummings reported the good and the bad about Col. Cole and made no recommendation that Cole be disciplined while recommending discipline for several other officers who apparently were more involved than Cole.

doing the things that the Court finds they did within the scope of their authority. That is not the function of this Court as an error by an official in the doing of an act within the scope of his authority is not actionable.

DONE this 11th day of December, 1978.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIAM R. COLE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	78-83-N
HENRY B. GRAY,III,	)	
Etc.; ET AL,	)	FILED
	)	DEC 11 9:05 AM 1978
Defendants.	)	JANE P. GORDON, CLERK
		U.S. DISTRICT COURT
		MIDDLE DISTRICT OF ALA.
		M.T.
		DEPUTY CLERK

O R D E R

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the motions for summary judgment filed herein by Defendants Gray and Cummings be, and the same are hereby, granted, and Henry B. Gray, III, and Francis J. Cummings are hereby dismissed as parties Defendant to this cause of action.

It is further

ORDERED by this Court that the motions for summary judgment filed herein by Defendants Jones and Holmes be, and the same are hereby, denied.

This Court is of the opinion that this Order as it relates to the matters determined by this Court herein, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation within the meaning of 28 U.S.C. § 1292(b). The Court is further of the opinion that, if the Court is in error in dismissing the cases against two Defendants and retaining the cases against the other two, it will be necessary to try the cases separately, though the cases could be tried jointly, and considerable time and money saved if all four Defendants should be tried. This Court also recognizes the possibility that the Curt could be in error in not granting official immunity to the two officials remaining in the case, and in that event, an ex-

pensive trial to the Government and to all the parties may be averted by consideration by the Court of Appeals at this time.

DONE this 11th day of December, 1978.

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-8497

U.S. COURT OF APPEALS
FILED

MAR 14 '79

EDWARD W. WADSWORTH
CLERK

FRED R. JONES, individually
and as State Senator, and
ALVIN HOLMES, individually
and as State Representative,

Petitioners,
Cross-Respondents,

versus

WILLIAM R. COLE,

Respondent,
Cross-Petitioner,

- - - - -

On Applications for Leave to Appeal from an Interlocutory Order

- - - - -

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitions for leave to appeal from the interlocutory order of the United States District Court for the Middle District of Alabama entered on December 11, 1978, are GRANTED.

/s/ SRT

/s/ I.L.G.

/s/ PHR

William R. COLE, Plaintiff-Appellee-
Cross Appellant,

v.

Henry B. GRAY, III, Etc., et al.,
Defendants-Cross Appellees,

Fred R. Jones, individually and as State
Senator and Alvin Holmes, Etc., De-
fendants-Appellants-Cross Appellees.

No. 79-1692.

United States Court of Appeals,
Fifth Circuit.

March 2, 1981.

Appeals from the United States District Court for the Middle District of Alabama.

Before VANCE and GARZA, Circuit Judges and ALLGOOD,* District Judge.

GARZA, Circuit Judge:

This litigation arises from a series of state and federal investigations of wrongdoing

*District Judge of the Northern District of Alabama sitting by designation.

by personnel within the Military Department of the State of Alabama. Among the subjects of inquiry was plaintiff-appellant William Cole, a colonel in the Alabama Army National Guard and chief of one of the military department's divisions. After the investigatory dust had settled, Cole brought this suit against a state senator and state representative who had participated in a legislative survey of the allegations, the adjutant-general of the military department who had dismissed him from his position, and a major in the United States Army who was dispatched to pursue an independent federal inspection.

Cole asserted that the defendants by their conduct with regard to these investigations had wrongfully deprived him of his good name, his right of free speech, and certain property rights related to his guard status, within the cognizance of 42 U.S.C. §§ 1983 and 1985. The defendants interposed various defenses of immunity by motions for summary judgment. The district court granted the mo-

tions of the "executive defendants," but denied those of the legislators.

Cole now appeals from the summary judgment granted the executive defendants, and we have authoried an interlocutory appeal by the legislative defendants from the denial of their motions. For the reasons stated below, we conclude that the judgment of the district court must be affirmed where the motions were granted and reversed where they were denied.

I.

William Cole was for many years a non-probationary employee of the military department, and a federally recognized colonel in the Alabama national guard. He held the permanent merit system classification of Military Executive Officer, and served as chief of the Personnel and Administrative Division of the military department.

During the time that Cole held the latter position, the compulsory military draft was terminated. As a consequence, federal funds

were made available for "recruitment and retention." It is apparent that Cole and other officers were compensated from these funds for time spent in performing recruitment and retention functions. It was not the disbursement of the funds which caused controversy, but the amounts paid out.

In October of 1975, the Alabama legislature passed a resolution creating a joint interim committee to investigate the use of federal funds in the state. The resolution was introduced by State Senator Fred R. Jones. The resulting committee consisted of three Senators, including Jones, and three representatives, including Alvin Holmes.

Holmes moved that the committee look into into affairs in the military department. Senator Jones had been connected with the department in the past, having been named assistant adjutant-general and nominated for the rank of brigadier general by the governor. Time-in-service requirements prevented federal recognition of such a rank. Jones offered to ab-

stain from participation in the investigation of the military department, but the committee refused to accept his move. When hearings on the matter began, therefore, he was an active participant.

The hearings were open to the public and were widely reported by the news media. The committee discovered that high-ranking officers in the department had been paid for a substantial number of extra duty days. In 1975, for example, the following officers received, in addition to their salaries and approximately 48 days of "drill pay," payment for extra duty as shown below:

General Rollo (then adj. gen.)	171 extra duty days
Colonel Speigner	136 extra duty days
Major Hawthorn	179 extra duty days
Colonel Hora	129 extra duty days
Colonel Cole	166 extra duty days

During the hearings, Jones stated that funds were "squandered," and Holmes asserted that Cole did not work on all of the days for which he received pay.

As we have noted, the Interim Committee investigation spawned parallel inquiries. Adjutant-General Rollo asked the Commanding General of the First Army to conduct an investigation. Pursuant to this request, Major Francis Cummings was sent to Alabama to prepare a report of inquiry, arriving in March of 1976. He was contacted by Senator Jones immediately on arrival, and met with him on several occasions to discuss the charges. At one point, Jones asked him to contact the United States Attorney about the matter.

As a result of disclosures at the committee hearings, Governor Wallace acted in May to prohibit officers from receiving extra-duty pay in the absence of written authorization from his office. The interim committee was dissolved by the expiration of its legislative mandate on June 3rd.

Major Cummings' report was filed on September 14th. It levelled two basic charges against Cole: (1) that he excessively used man-days, receiving pay for work that was ap-

parently not necessary, and (2) that he participated in defrauding the federal government out of hundreds of thousands of dollars annually in the method of issuing orders in the Alabama military department. The report was released to the public in March of 1977 at the governor's request, and Adjutant-General Rollo resigned his post. General Henry Gray was appointed to succeed him, taking office with instructions to "clean up the mess."

General Gray contacted Senator Jones and apparently discussed the Military Department problems with him in detail. He later testified that while he was considering an appropriate course of action, he "had a great deal of information from...Senator Jones concerning the legislative subcommittee investigation into the Guard." Gray suspended Cole, and on April 20, 1977, the Colonel received a letter signed by the new Adjutant-General which dismissed him from his non-probationary merit system position. Gray forwarded to the first army a request that Cole be stripped of his

federal recognition as a colonel in the national guard.

Cole appealed his dismissal to the Alabama Personnel Board, which ordered him reinstated. The board was, nontheless, highly critical of the practices which led to the discharge and denied thirty-three days of salary. Gray publicly commentd that the occasion was "a sad day for honesty and integrity in government," and reduced Cole's responsibilities to those of a branch chief within the plans, operations, and training division of the military department. The recommendation that federal recognition of Cole's rank be withdrawn was dropped at the governor's request.

When the news of the Personnel Board's decision was prematurely "leaked," Representative Holmes contacted the State Personnel Director and asked if he could reappear before the board. At a public press conference, he stated his opposition to the reinstatement and called Cole the "most notorious racist out

there." After Gray withdrew his request that federal recognition of Cole's rank be terminated, Holmes was quoted by the press as saying that Cole and other officers were "some of the most corrupt individuals...who have ever served in public office," and that "Wallace says he's for law and order, but he's not for putting while collar criminals behind bars." Holmes expressed surprise that Cole and other officers had not been indicted by a federal grand jury.

II.

Cole filed suit on March 20, 1978, against Jones, Holmes, Gray and Cummings. The thrust of his position was that the defendants had engaged in a campaign of harassment and revenge, seeking to oust him from his position and to punish him for activities which he claimed were necessary, proper, and successful.

Cole's advocacy of a strong guard as an integral component of the national defense was

said to have partially formed the basis of personal and political animosities underlying this "campaign." With regard to Senator Jones, Cole contended that the denial of federal recognition for a brigadier generalship had triggered a crusade of retribution.

Cole asserted that when the senator was informed that hs generalship would not be forthcoming, he introduced the resolution creating the joint interim committee, knowing that Cole had been responsible for contacting the National Guard Bureau on federal recognition matters. Code [sic] has further maintained that Jones told him previously, "If you f*** with my promotion papers, I will spend the rest of my life f***ing you." It was emphasized that Jones' activities continued after the dissolution of the interim committee.

Holmes was accused of having acted along with Jones in creating the interim committee, "to examine and falsely criticize the plaintiff in the conduct of his employment." Also noted were Holmes' contacts with Major Cum-

mings, his efforts to have the Personnel Board's decision overturned, and his comments following Cole's reinstatement.

Cole has asserted that Major Cummings' "possessed an attitude that Alabama had too many people in the National Guard and that potential economic benefits should not be used to encourage recruiting and retention," and that he was thus "fully receptive to the allegations of wrongdoing which were supplied to him by then-senator Jones." In his complaint, Cole accused Cummings of acting in concert with Jones and Holmes to generate and submit false information. It was particularly alleged that Cummings failed to conduct his investigation in accordance with "regulations and law," in that he refused "to properly advise the Plaintiff that he would be the subject of adverse comments in the report."

General Gray was accused of conspiring with Jones and others to deprive Cole of his merit system position. It was allegd that Gray acted upon information which he knew to

be false, and that after reinstatement had been ordered, he "persisted to defame and stigmatize the plaintiff by publicly accusing him of dishonesty..."

The defendants were said to have conspired and acted in concert to deprive Cole of rights secured by the Constitution, and were accused of attempting to achieve his dismissal through false accusations. Jones, Holmes and Gray were said to have acted under color of state law in their official capacities, while Cummings was said to have acted in his capacity as a federal officer, but in concert with the other defendants who acted under color of state law. The specific injuries were said to have been severe damage to Cole's reputation, the temporary loss of his merit system position, and the unwarranted initiation of proceedings to withdraw federal recognition of his rank. Cole sought four million dollars in damages and an injunction against further "harassment."

III.

Each defendant filed a motion for summary judgment. On December 11, 1978, the district court entered an order granting the motions of Gray and Cummings, and denying those of Jones and Holmes. The court found sufficient evidence to create "an issue of fact as to whether the allegd conspiracy existed and whether the defendants were parties thereto."

Noting that "all defendants were public officials," the court based its distinction between the executive and legislative defendants upon an analysis of the various claims of official immunity. It was held (1) that all defendants were not responsible for damages "caused by their attending to their official functions within their constitutional authority;" (2) that Gray and Cummings, as military officers directly concerned with the investigation and remedial measures pursuant thereto, had "an official duty to determine whether or not [Cole] should be discharged or whether or not [he] should be recommended for

stripping of [his] federal rank;" (3) that they acted constitutionally within the scope of official duty, being thus immune from suit; (4) and that Jones and Holmes, as state legislators, possessed an immunity from suit "if [they] were doing an act delegated by law to the legislative branch," but no immunity for the "improper dissemination of defamatory information outside of the legislative process." Further finding that "[R]emarks, calculated to cause discharge or demotion of a public employee, which are made on radio, television or in private communications by a legislative officer, while the legislature is not considering the questions involved, are not made within the scope of legislative authority," and that "there is no undenied evidence before this court that any distribution of information by defendants Jones and Holmes after termination of the legislative investigation of the Alabama National Guard was essential for the conduct of the public business of legislating," the court determined that their mo-

tion for summary judgment should be denied.

IV.

On this appeal, Cole contends that the district court erred in finding Gray and Cummings to have been protected by an official immunity. The legislative defendants argue that the trial court erred in finding them unprotected, and that in any event, summary judgment in their favor was required because Cole failed to raise a fact issue with regard to their alleged conspiratorial participation. We will first discuss the controversy related to the executive defendants.

Both Gray and Cummings assert that on the facts of this case their actions were shielded by the absolute official immunity described in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), and if we should find to the contrary, that they were clearly within the parameters of the qualified immunity discussed in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

[1] The district court found that Gray acted within the scope of his authority, and pursuant to a specifically assigned duty to investigate the charges against his officers. It further found that he acted with a reasonable belief, in good faith, that his actions were proper.

Viewing the evidence in the light most favorable to Cole's position, we hold Gray to come within the range of the qualified Scheuer immunity. Gray was specifically chargd by the governor with investigating the charges. He did exactly that, concluding that the actions complained of were abuses of sufficient magnitude to warrant discharge. That the State Personnel Board later disagreed with the sanction imposed does not obviate a conclusion that Gray acted in good faith.

We note that the interim committee investigation was completed months before Gray took office. Cummings completed his role before the appointment, and Gray never met him. The only allegation bearing the slightest poten-

tial damage to Gray's claim of good faith was that of his attendance at a luncheon meeting with Jones before the discharge. Cole asserts that as this meeting took place on April 24th and he was suspended by Gray on the 25th, he must have been the subject of the conversation. That amounts, of course, to mere speculation. Gray testified that he wanted general information and did not discuss specifics with regard to any individual.

The evidence does not support any theory that Gray was party to a scheme to railroad Cole out of office, or even that he was unfairly receptive to Jones' view of the charges. There is certainly no showing beyond mere allegation that Gray knowingly received and acted on false information. The evidence tends to show instead that Gray was simply attempting to compile a broad body of information upon which the decision officially entrusted to him could be made. It would have been strange indeed to avoid consultation with the legislators who spearheaded a previous

committee investigation. Gray then acted pursuant to his authority under Section 36-26-27, Code of Alabama, 1975, and Section 2 of Rule XIII of the rules of the State Personnel Board by instituting proceedings to terminate Cole's employment with the State of Alabama, advising him that he could within ten days request an investigation by the State Personnel Board. In rquesting that Cole's federal recognition be withdrawn, Gray acted within the authority imposed upon him by National Guard Regulation 635-101.

> In Scheuer, the Supreme Court noted: It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S. 232 at 247, 94 S.Ct. 1683 at 1692, 40 L.Ed.2d 90 at 103.

It is manifestly apparent that Gray is protected by this concept.

[2] With regard to Cummings, the court found both investigation and report to have been conducted according to orders and within the scope of official authority. We find no evidence to even hint at an opposite conclusion. It is manifestly apparent that his actions were taken in good faith, within the scope of his discretion and the responsibilities of his office. The district court noted that "Cummings reported the good and the bad about Colonel Cole and made no recommendation that Cole be disciplined while recommending discipline for several other officers who apparently were more involved than Cole." Cummings' actions were clearly within the range of the Scheuer immunity, and the district court was eminently correct in granting summary judgment for him.

We are thus in agreement with the disposition of this suit as to the executive defendants. We do not indicate approval or disapproval of their actions, but simply find them to have been within the potentially protected

realm of official capacity, free of the corrosive effects of bad faith. Those few shreds of evidence which are said to indicate bad faith, such as contact with Jones and Holmes, show no more than an inattention to the political nuances of outward appearances.

[3, 4] The legislative defendants do not have such smooth sailing on their claims to immunity. Both argued below that their public and private statements concerning Cole were immunized from suit by the Speech and Debate Clause, U.S.Const. Art. I, § 6, Cl. 1. The district court apparently accepted the potential applicability of such a privilege to them, for it cited Hutchinson v. Proxmire, 579 F.2d 1027 (7 Cir. 1978), rev'd. 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), for the proposition that "immunity does not attach to the improper dissemination of defamatory information outside of the legislative process." Accordingly, statements and activities occurring after the dissolution of the committe were held unprotected.

We find reliance on the Speech or Debate Clause to be misplaced. Hutchinson v. Proxmire involved a United States senator, not a state legislator. By its recent decision in United States v. Gillock, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court has unequivocally ruled that the embrace of the clause does not extend to a state legislator. The Court reaffirmed, however, its holding in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that members of a state legislature are potentially immune from suits for the alleged violation of civil rights under §§1983 and 1985, on the theory that a common law absolute immunity from suit survived the passage of the Civil Rights Act of 1871.

The Tenney immunity is only absolute within its scope, however, and coverage of Jones and Holmes is limited by the same considerations articulated in Hutchinson. It extends only to acts done "within the sphere of legitimate legislative activity." Tenney, 341

U.S. 367 at 376, 71 S.Ct. 783 at 788, 95 L.Ed. 1019 at 1027. In Tenney, the Court rejected an argument that the California senate's fact-finding committee on un-American activities had exceeded this scope: "to find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the judiciary or the executive." 341 U.S. 367 at 378, 71 S.Ct. 783 at 789, 95 L.Ed. 1019 at 1028.

Thus, we must conclude that the actions of Jones and Holmes taken during the pendency of the committee were protected by this rationale. We find those actions and statements, occurring after the committee dissolved to be outside its coverage. After the specific investigatory mandate expired, the reasoning of Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) becomes applicable by analogy: "[M]embers of Congress are constantly in touch with the executive branch of the government and with administra-

tive agencies... They may cajole and exhort with respect to the administration of a federal statute--but such conduct, though generally done, is not protected legislative activity." 408 U.S. 606 at 625, 92 S.Ct. 2614 at 2627, 33 L.Ed.2d 583 at 602.

As best we can construe them, Cole's allegations as to the defendants' actions after the committee's dissolution are (1) that by their comments, they defamed Cole and deprived him of his good name, and (2) that in conspiracy with Gray and Cummings, they acted to deprive him of his position without due process of law, effecting a denial of equal protection.

[5] Insofar as the complaint alleged an injury by defamation alone, referring to negative public statements made by the defendants, the district court was correct in finding no cause of action under the Civil Rights Acts. The Supreme Court established in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976) that the loss of a good name, as

destroyed by defamation on the part of a public official, is not a "liberty or property interest" for which these statutes provide protection.

[6] We are left with the portion of the complaint alleging a conspiracy to deprive Cole of his position. The complaint was cast in terms of conspiracy by necessity, as under § 1985, a finding of conspiracy is legally required, and under § 1983, the circumstances of this case rendfer it factually required; Gray did the firing, so Jones and Holmes can only have participated by conspiracy with him.

As we noted in discussing Gray's claim to immunity, the evidence does not nearly support a theory of conspiracy between Gray and the legislative defendants. Cole has shown a possible motive of personal animosity on the part of Jones, but there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment. He has shown minimal contact between the executive and legislative defen-

dants, with no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself. These elements, murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculation and conclusory allegations. The evidence was wholly insufficient to raise a fact issue for trial on the conspirarcy complaint.

There is nothing left of Colonel Cole's complaints. We close with the observation that the Civil Rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state action. In this instance, the political and governmental processes involved worked to investigate and resolve the allegations against Cole and, after the prescribed procedures had run their course, to restore him to his position. There

is no reason and no room for involvement on the part of a federal court.

For these reasons, that portion of the judgment of the district court dismissing the claim against Gray and Cummings is AFFIRMED, and that portion related to Jones and Holmes is REVERSED and REMANDED with instructions that the remainder of the complaint be dismissed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1692

U.S. COURT OF APPEALS
FILED

MAR 31 1981

GILBERT F. GANUCHEAU
CLERK

WILLIAM R. COLE,

Plaintiff-Appellee-
Cross Appellant,

versus

HENRY B. GRAY, III, Etc., ET AL.,

Defendants-Cross
Appellees,

FRED R. JONES, individually and
as State Senator and ALVIN HOLMES,
Etc.,

Defendants-Appellees-
Cross Appellees.

- - - - -

Appeals from the United States District Court
for the Middle District of Alabama

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 2, 1981, 5 Cir., 197_, _____F.2d_____).

(MAR 31 1981)

Before VANCE and GARZA, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service no having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE

*District Judge of the Northern District of Alabama sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1692

D. C. Docket No. 78-83-N-Civ

FILED

APR 30 11:42 AM 1981
JANE P. GORDON, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALA.

DEPUTY CLERK

WILLIAM R. COLE,

Plaintiff-Appellee
Cross Appellant,

versus

HENRY B. GRAY, III, ETC., ET AL.,
Defendants, Cross
Appellees,

FRED R. JONES, individually
and as State Senator and ALVIN
HOLMES, ETC.,

Defendants-Appellants
Cross Appellees.

Appeals from the United States District Court
for the Middle District of Alabama

Before VANCE and GARZA, Circuit Judges
and ALLGOOD, *District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded with instructions to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendants-appellants pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 2, 1981

ISSUED AS MANDATE: APR 29 1981

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/s Brenda Hauck
Deputy Clerk
Atlanta, Ga.

APR 29 1981

*District Judge of the Northern District of Alabama sitting by designation.

UNITED STATES CONSTITUTION, FIRST AMENDMENT:

> "Congress shall make no law... abridging the freedom of speech...."

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

> "No person shall...be deprived of life, liberty, or property without due process of law...."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

> "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985(3):

"If two or more persons in any State or territory, conspire...for the purpose of depriving, either dirctly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,...in case of conspiracy set forth in this section, if one or mor persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

ARMY REGULATION 20-1, 25 OCTOBER 1974, CHAPTER 4, ¶4-2:

4-2 Responsibilities of Inspector General.

Inspectors General will collect and examine all available evidence per-

tinent to the matter under investigation or inquiry, and they will make a complete and impartial presentation thereof. Inquiries or investigations initiated as a result of an Inspector General action request will address each allegation in sufficient detail to either substantiate or refute it or, if sufficient evidence is not available, to so indicate. Allegations will not be ignored because they appear to be unimportant, impertinent, irrelevant, or subsequently withdrawn by the complainant. In their reports, Inspectors General will discuss the evidence presented and will reach conclusions and make recommendations based upon available evidence. They have no power to make legal findings or impose punishment. They will make every effort to insure that no injustice is done in conducting and reporting on investigations and inquiries they make. Inspectors General and other individuals with knowledge of Inspector General investigations and inquiries will refrain from unofficial discussion and comment upon such investigations.

DEPARTMENT OF THE ARMY TECHNICAL BULLETIN, TB-IG4, INSPECTOR GENERAL GUIDANCE MATERIAL, AUGUST 1967:

Section 1, ¶14

14. Qualifications of an Investigating Officer. An investigating officer must be impartial, unprejudiced, tactful, and without bias.

His investigation must be made with an open mind and without any preconceived opinions as to the truth of falsity of the matters at issue. Some of the personal qualities which an investigating officer must possess are listed below.

a. The investigating officer must be self-confident and self-reliant. The successful investigating officer attains his ends by the adroit interrogation of witnesses and handling other matters connected with the case. He also must be firm, always bearing in mind that he represents the directing authority.

b. It is essential that the investigating officer be dignified in his relations with both military and civilian personnel. The office who, by lack of dignity or by carelessness in conduct or appearance, exhibits an indifference to his mission, cannot expect to command the respect of others.

Section 1, ¶15:

15. Responsibilities of an Investigating Officer. a. The investigating officer has a dual responsibility. He is responsible to the directing authority and must be diligent to protect and further the interests of the Government. He is likewise responsible to the persons who are under investigation. Their rights must be scrupulously observed. The investigating officer must make sure that not even a sem-

blance of injustice is attributable to his own carelessness or neglect.

b. The investigating officer is a fact finder. The directing authority will base his decisions and his actions upon the facts presented to him; therefore, the investigating officer must thoroughly investigate the facts bearing upon a given situation and make an accurate , complete, and impartial report. He does not conduct a trial and he must not assume that a directive for investigation indicates either the guilt or innocence of the persons involved, or that an allegation necessarily indicates wrong-doing.

Section V, ¶41(b):

b. Importance.

(1) The investigating officer must realize that the report of investigation is an important document which requires great care in its preparation. The report is important because it usually affects the future of the person under investigation, or it may result in a change of policy. If it concerns a person's future, this alone demands that it be impartial and complete. When it affects a policy, it must be accurate and dependable. In any event, it must present the facts to the commander so that he can take whatever action may be necessary.

(2) An investigation does not necessarily sustain the charges of allegations upon which it was based. Frequently, such charges and allega-

tions are untrue. In such cases, the obligation to disprove charges is as great as the obligation to prove them when they are true. The report of investigation must reflect all ascertainable facts, and must be accurate, reliable, and impartial.

(3) The requirements of a report of investigation, in addition to those set forth above, are--

(a) It must be intelligible;
(b) The subject matter must be systematically arranged;
(c) The statements and references must be correct.